UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-11233-REG

- -x

In the Matter of:

CHEMTURA CORPORATION, et al.,

Debtors.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 13, 2011

9:49 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Doc #5533 - Hearing on Notice of Proposed Order Regarding Bio-Lab Conyers, Georgia Fire Settlement Claimant Appeals - 6 Objections.

HEARING re Doc #5265 Debtors' Summary Judgment Motion with Respect NPC Services.

Transcribed by: Pnina Eilberg

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning. Have seats, please.

All right, folks. This is a Chemtura day. I'll deal with preliminary matters first, such as the Conyers Fire and then I'll deal with NPC.

MR. GENTLE: Good morning, Your Honor. Ed Gentle with Gentle, Turner & Sexton in Birmingham, Alabama. I'm your Conyers Fire settlement administrator.

THE COURT: Yeah.

MR. GENTLE: And we have before the Court nine remaining claims to be resolved. We've resolved 2,800. I have a proposed disposition for eight out of nine, recognizing that the Court has equity powers that perhaps a settlement administrator lacks and as we try to balance guarding the fisk (ph.) but being fair, finding that sweet spot, Your Honor.

So if the Court thinks well of it, I've provided you a one-page score card and I thought what I would suggest, for your consideration, is to just march through them and provide a recommended disposition which I think would be fair to both the fisk and the claimant.

THE COURT: Pause for just a second please, Mr. Gentle.

MR. GENTLE: Yes, sir.

THE COURT: Are any of the folks whose appeals are

before me on the phone now?

MR. GENTLE: Your Honor, I think there's Brenda Johnson, Horace Stroud, Brenda Johnson's number two, Mr. Stroud number five, Natalie Whylly number six and then of the lates Katrina Duncan-Najib.

THE COURT: Okay. Ms. Johnson, are you on the phone? Ms. Johnson, Brenda Johnson.

MS. JOHNSON: This is Brenda Johnson.

THE COURT: Oh, okay, Ms. Johnson. Thank you.

MR. GENTLE: Ms. Blackwell too, Your Honor.

THE COURT: Okay. Stand by for just a minute please, Ms. Johnson.

MS. JOHNSON: Okay.

THE COURT: Yes.

MS. NAJIB: My name is Katrina Najib.

THE COURT: Okay. Ms. Najib, I have you and I have Ms. Johnson. If any other folks were speaking I couldn't understand what was being said.

MS. BLACKWELL: Well, I'm Rebecca Blackwell. You put me on hold.

THE COURT: Your name please, ma'am?

MS. BLACKWELL: Rebecca Blackwell. That's R-E-B-E-C-C-A --

THE COURT: Yes.

MS. BLACKWELL: B-L-A-C-K-W-E-L-L.

THE COURT: Oh, Ms. Blackwell.

MS. BLACKWELL: Uh-huh.

THE COURT: Okay. Okay. Forgive me. Okay. I have Ms. Najib, Ms. Blackwell, Ms. Johnson. Okay.

Folks on the phone, I'm going to ask Mr. Gentle to speak first in general terms and then to talk about each of you individually. And then I'm going to ask him to pause, after he's finished each person individually, to give you folks a chance to comment if you want to. Okay.

Start, please, Mr. Gentle.

MR. GENTLE: Yes, sir. For Ms. Blackwell --

MS. BLACKWELL: Uh-huh.

MR. GENTLE: She shows, Your Honor, a current address in the evacuation area. Technically speaking, the claim form required proof that she was there during the fire period in 2004. However, Your Honor, I think speaking in equity, I think you wouldn't move to the evacuation area just to get a payment. So I think -- and she did sign the claim form under oath saying that she was in the evacuation area. So I think, Your Honor, that her appeal should be granted.

THE COURT: Okay.

MS. BLACKWELL: Uh-huh.

THE COURT: Ms. Blackwell?

MS. BLACKWELL: Uh-huh.

THE COURT: I know you have some noise in the

background but --

MS. BLACKWELL: Yeah, it's my grandson.

THE COURT: Okay. But Ms. Blackwell, he recommended that your appeal be granted and that you get the money. I assume that's okay with you?

MS. BLACKWELL: Yes. Uh-huh.

THE COURT: Okay. So your appeal is granted and now you can either stay on the phone or drop off. But to tell you the truth, if you have childcare responsibilities, I would suggest that you drop off and quit while you're ahead.

MS. BLACKWELL: Well, do you have any more questions to ask?

THE COURT: I think Mr. Gentle can take care of everything from here. Am I correct, Mr. Gentle?

MR. GENTLE: Yes, Your Honor.

THE COURT: Yes, he nodded.

MS. BLACKWELL: Okay.

THE COURT: So your appeal is granted, Ms. Blackwell and I would suggest that you drop off the phone.

MS. BLACKWELL: Oh, okay. So you don't have anything else to ask?

THE COURT: Not of you, I don't.

MS. BLACKWELL: Oh, okay. So I assume I don't have to talk with anyone else?

THE COURT: That's correct.

MS. BLACKWELL: Oh, okay. Thank you now.

THE COURT: Have a good day.

MS. BLACKWELL: You too. Bye bye.

THE COURT: Next, Mr. Gentle.

MR. GENTLE: Yes, Your Honor. Brenda Johnson, I had an issue about a possible prior payment by Bio-Lab of 1,400 dollars and the settlement agreement requires that there be no double dipping.

However, the payment to the Brenda Johnson under the Bio-Lab database does not have a Social Security number and was to a different address and Ms. Johnson said she didn't get the money. So I think her appeal should be granted also, Your Honor, and that setoff should not be applied.

THE COURT: Okay. Ms. Johnson, did you hear Mr. Gentle's recommendation?

MS. JOHNSON: Yes I did, sir.

THE COURT: And I assume you're fine with that as well?

MS. JOHNSON: I am, sir.

THE COURT: Okay. Your appeal is granted and I'm going to tell you the same thing I told Ms. Blackwell, that you're free to drop off the phone and you may choose to do that.

MS. JOHNSON: Thank you, sir. That's what I'm going to do.

THE COURT: Okay. Have a good day.

MS. JOHNSON: Have a good day.

THE COURT: All right. Mr. Gentle, continue please.

MR. GENTLE: Yes, sir. Edna Lynch, in my opinion Your Honor, should have the same disposition as Ms. Blackwell. She does live in the evacuation area, just didn't show proof she was there at the time. But in light of that and her signing the claim form under oath, I think it should be granted.

THE COURT: Okay. I don't know if I have a record of Ms. Lynch being on the phone. Ms. Lynch, are you on the phone?

THE OPERATOR: No, sir. There's no telephonic appearance for that matter, Your Honor.

THE COURT: Okay. But I'm going to go with your recommendation, Mr. Gentle.

MR. GENTLE: Yes, sir.

THE COURT: Okay.

MR. GENTLE: Theresa Roberts, Your Honor.

THE COURT: Yes, sir.

MR. GENTLE: We had a database we obtained from Spirit Environmental that does a lot of class actions with me, showing that her address is not in the class area. However, with Google Earth she's on the line. So in light of that, Your Honor, I think she should be allowed as being in the class area with her appeal to be granted.

THE COURT: Okay. Ms. Roberts, are you on the phone?

I don't have a record of that either, I don't think.

(No response)

THE COURT: Okay. I'm going to go with your recommendation on that, Mr. Gentle. So her appeal will be granted.

MR. GENTLE: Yes, sir.

THE COURT: Okay.

MR. GENTLE: Mr. Stroud claimed in his claim form that he had received 1,000 dollars from Bio-Lab. It would be a setoff, Your Honor, like we discussed with another claimant. However, Bio-Lab does not show it in its records. So if Mr. Stroud is on the line, perhaps he could tell us if he really got the 1,000 dollars. We're just at a dilemma on that one.

THE COURT: Mr. Stroud, are you on the line?

MS. STROUD: Yes, sir.

THE COURT: Okay.

MS. STROUD: I'm Mrs. Stroud, the wife. He has, like, a hearing problem.

THE COURT: Okay.

MS. STROUD: So I'm hoping I can answer whatever you need.

THE COURT: Mr. Gentle, we're going to do rough justice here. Do you have any objection to Ms. Stroud speaking on behalf of her husband?

MR. GENTLE: No, sir.

THE COURT: Okay. Ms. Stroud?

MS. STROUD: Yes, sir.

THE COURT: I am going to put you under oath over the phone and ask that you solemnly swear that whatever you tell me is the truth, the whole truth and nothing but the truth, so help you God. Do you so swear?

THE WITNESS: I do.

(Witness duly sworn)

THE COURT: Okay. I would like you now to answer Mr. Gentle's questions, as he puts them to you in front of me. Go ahead, Mr. Gentle.

DIRECT EXAMINATION

BY MR. GENTLE:

Q. Ms. Stroud, good morning.

A. Good morning.

Q. Did Mr. Stroud receive 1,000 dollars from Bio-Lab in connection with the fire?

A. Yes, he did.

Q. Okay. Thank you.

THE COURT: Okay. Then your recommendation is that that 1,000 will be subtracted from what he's otherwise entitled to get?

MR. GENTLE: Yes, Your Honor.

THE COURT: So there's no double counting?

MR. GENTLE: That's correct, Your Honor.

THE COURT: Okay. Ms. Stroud, do you understand what the ruling is? You're going to get the difference but the 1,000 that he already received is, in essence, applied to the total amount.

THE WITNESS: Yes, sir.

THE COURT: Okay. That's the ruling. I don't know if that's considered an appeal denied or an appeal granted but the question's answered, Mr. Gentle.

MR. GENTLE: And we'll draft for your review, Your Honor, a proposed order.

THE COURT: Fair enough.

MR. GENTLE: Ms. Whylly provided us --

THE COURT: Pause please, Mr. Gentle.

MR. GENTLE: Yes, sir. Yes, sir.

THE COURT: Ms. Stroud, I'm going to tell you the same thing I told the other folks, which is you're free to drop off the line if you choose to.

THE WITNESS: Thanks, Your Honor.

THE COURT: Have a good day.

THE WITNESS: Good day.

THE COURT: Go ahead please, Mr. Gentle.

MR. GENTLE: Yes, Your Honor. Ms. Whylly provided documentation now, Your Honor, showing that with a name change she is the verified claimant and so her appeal should be granted also because she's provided the necessary additional

documentation.

THE COURT: Okay. Ms. Whylly are you on the phone?

MS. WHYLLY: Yes, I am.

THE COURT: Did you hear and follow Mr. Gentle's recommendation? Basically, as I understood what he told me, he said that now that you've provided the extra information he agrees with you.

MS. WHYLLY: Okay. Thank you.

THE COURT: Okay. So I'm going with your recommendation on that as well, Mr. Gentle.

MR. GENTLE: Yes, Your Honor. The next one, Ms. Najib, she applied as an extraordinary claimant. There were two categories, extraordinary and ordinary. A bit complex and really I think we should look at the substance of the claim, Your Honor.

If we recharacterize her as an ordinary claimant she is in the evacuation area and she would get approximately 1,800 dollars. So if she thinks well of it, I would just recommend that we cure her claim in equity, Your Honor, and award her as if she was an ordinary claimant. And after we to a true up we're going to file with the Court in a few weeks, she'll see that she'll get somewhere in that neighborhood of 1,800 dollars.

THE COURT: Okay. Ms. Najib, do you want to comment on that?

MS. NAJIB: I don't think that I have a comment. That's okay with me if that's the Court's recommendation.

THE COURT: Okay. Then your recommendation's approved, Mr. Gentle.

MR. GENTLE: Thank you, Judge.

THE COURT: And Ms. Najib, you're free to drop off the line too, if you choose to.

MS. NAJIB: Thank you so much.

THE COURT: Have a good day.

MS. NAJIB: You too.

MR. GENTLE: The next one, Your Honor, Ms. Holomb (ph.), should be cured just like Ms. Blackwell was. She's sworn under oath that she was in the evacuation area. So I'd recommend it be granted.

THE COURT: Okay. Ms. Holomb, are you on the phone? I don't show a Ms. Holomb on the log.

(No response)

THE COURT: Okay. Your recommendation's approved, Mr. Gentle.

MR. GENTLE: Thank you, Judge. And Judge, the last one, this Thai Ocean Restaurant, they provided us, after we made our submission, the necessary document to be awarded $3,085.55. So we'd recommend that their appeal also be granted for that amount, $3,085.55.

THE COURT: Okay. I don't have any indication of

those folks on my phone log. Are either the company or the individual on the phone?

THE OPERATOR: There's no telephonic appearance for that matter, Your Honor.

THE COURT: Okay. Thank you, CourtCall.

I'll go with your recommendation on that as well, Mr. Gentle.

MR. GENTLE: That completes my presentation, Your Honor.

THE COURT: Okay. Very good. Mr. Gentle, I simply want to say that I want to thank you for the care that you gave to these individual folks and the fairness that you've showed in your role on this. I appreciate it.

MR. GENTLE: Our great pleasure, Your Honor. Thank you.

MR. GENTLE: Thank you.

THE OPERATOR: Excuse me, Your Honor.

THE COURT: Yes.

THE OPERATOR: We have a counsel, Scott McCabe on the line.

THE COURT: Yeah, I see that. But also -- in a listen only mode. Mr. McCabe, do you have a desire to be heard on anything that I just dealt with?

MR. MCCABE: No, I don't.

THE COURT: Okay. Are you staying for the remaining

arguments, the environmental issues?

MR. MCCABE: Yes, I was planning on it.

THE COURT: Okay. Yeah. All right. CourtCall, keep him on the phone and am I right, CourtCall, that Mr. McCabe is the only one left on the phone at this point?

THE OPERATOR: Yes, Your Honor.

THE COURT: Okay. That's fine.

THE OPERATOR: Thank you.

THE COURT: All right. Let's now turn to Chemtura and NPC. Come on up for that and I have some preliminary comments.

(Pause)

THE COURT: I'd like to get appearances from everybody and then ask you all to sit down and I, as I said, have comments.

MR. CATALANELLO: Good morning, Your Honor. Gerard Catalanello from the law firm of Duane Morris, accompanied here today by my partner Bill Heuer on behalf of Chemtura Corporation.

THE COURT: Okay. Thank you.

MR. CRAWFORD: Good morning, Your Honor. Michael Crawford of the law firm Taylor Porter Brooks & Phillips in Baton Rouge, Louisiana.

THE COURT: Mr. Crawford.

MR. CRAWFORD: On behalf of NPC Services Inc and local counsel, Robert Michael.

THE COURT: Right. Okay. Will I be hearing mainly from you, Mr. Crawford?

MR. CRAWFORD: Yes, Your Honor.

THE COURT: Okay. Mr. Michael, you're free to either stay or leave, as you prefer. I don't have a local counsel requirement but I think that you're probably riding shotgun to give Mr. Crawford some support and that's fine as well, of course.

MR. MICHAEL: Hopefully not, Your Honor.

THE COURT: Okay. Folks, make your presentations as you see fit but I want you to deal with the following questions and concerns that I have because, to tell you the truth, I have problems with both of your positions.

I want both sides to talk about the severally and not jointly language that appears at the beginning of the June 8th, 1984 contract because it may be said to talk about how the parties are entering into the agreement and it's less clear as to whether it describes the obligations that are undertaken by each of the parties in that connection. And I want the two sides to help me identify everything in the three key documents that talks about severally and not jointly or any variation of that in terms of what the obligations are.

But with that said, it appeared to me when I read the three agreements, the three agreements being the contract I just described which seems to be the number three document in

the trilogy, the consent decree that is, at least seemingly, number one in the trilogy and the agreement of settlement and compromise of disputed liability, which I'll simply call the settlement agreement, being the second of the three.

The important or seemingly important point that the debtor, Chemtura, wants to rely on -- that Mr. Catalanello wants to rely on, appears to be what I call document number two, the settlement agreement which has language in it that says, at I think it's fourth page, in the event of the insolvency or other inability of any of the industry defendants to meet any obligations under the consent decree and such obligations being imposed on the remaining industry defendants, they agree to share the other entities' obligation by pro rating the unavailable percentage, according to the formula that's prescribed there, and of course I'm paraphrasing.

First, I want both sides to address the extent, if any, to which the obligations that I described in contract number two, the settlement agreement, is incorporated by reference or otherwise in the contract of June 8th, 1984, which is what I call contract number three.

Now I saw at the end of contract number three, I thought I saw, an Exhibit A that makes reference to what I call contract number two. But it does so in an arguably ambiguous way, and I'm reading, "Each defendant company shall pay the share of the contract price stated in that certain agreement of

settlement and compromise of disputed liability dated December 16th, 1983". It doesn't quite say that the whole contract is incorporated by reference. But I guess whether or not it does is something you may want to be heard on because it may not make a difference, it's still an agreement between the parties.

But Mr. Catalanello, I'm going to need help from you because the clause that you're relying upon so heavily begins "In the event of the insolvency or other inability of any of the industry defendants to pay". And Chemtura isn't insolvent. That's why the equity committee got a distribution. And although I didn't agree with the equity committee that the company was worth as much as the equity committee asserted back at the time, there was no doubt, I think it was undisputed, that there was definitely value for the equity and your creditors got paid in full.

So the question I need you to help me on, I'm going to allow, of course, and invite both sides to comment on it, is how I should read the language that precedes that clause that says, "In the event of the insolvency or other inability to pay". At least seemingly Chemtura can pay and the question is whether or not it should.

Mr. Catalanello, before you're done, because remember, folks, that I'm not an appellate court. All I care about is you addressing these issues by the time you're done. I don't care what order you do. Has Chemtura already been asked to

belly up to the bar to pay, on account of this consent decree, by the federal government or any state environmental authorities?

One of the rationales for 502, and I keep forgetting all of the letters that follow it, disallowance of claims, is to protect the estate from double payment and it's not clear to me whether the estate is being tagged for double payment here or not. I'd like help from you on that.

Mr. Crawford, when it's your turn I need you to talk about agency -- actually, I need both sides to talk about agency because I think there is some showing of agency here, although I'm not sure if I can find agency as a matter of law.

The settlement agreement, which is contract number two, and the June 8th, 1984 contract, which is number three, especially read together walk and talk and quack like NPC was set up to act on behalf of the PRPs in that earlier environmental action that led to the consent decree.

I'm looking, in particular, at contract number two where it says "The industry defendants shall jointly designate a representative or separate entity to implement the remedial action and carry out the additional maintenance and monitoring required by the consent decree". That, arguably, or perhaps more than arguably creates an agency. But Mr. Crawford, you cited the Cajun Electric case which is a decision after trial; it's not on summary judgment if I read it correctly. Well, of

course both sides can speak to that. And it seemed to look at a lot of the extraneous facts and circumstances as to whether an agency was created and my tentative, based on reading a pile of paper you guys gave me before you, you know, had a chance to make your oral presentations, is that if NPC had asked for summary judgment in its favor on agency, I could not in any way, shape or form grant that. But I'm not sure if Chemtura, on the other hand, has gotten over the goal line on the matter of agency as well. And I think that I'm going to need evidence on the degree of control and the intention of the various parties in creating NPC. Which, if I didn't change my mind, would mean that neither side wins or loses today and that the party simply continues.

In several places, Mr. Catalanello, you talk about in reality and you're characterizing the arrangement in a pro-Chemtura form, which of course is your job. But it seems to me that when you're looking at stuff like in reality, that's the stuff that creates issues of fact.

Now Mr. Catalanello, you say that NPC is co-liable with the debtor, at pages 13 and 14 of your first brief. I didn't follow that so you'll have to help me on that. It would seem to me, subject to your rights to be heard, Mr. Crawford, that the other companies, the other defendants which became the shareholders of NPC and which are signatories to contract number three, the June 8th, 1984 contract, would be co-liable.

But it would seem to me that whether or not they are -- their co-liability transfers to NPC would depend on the agency issue that I just described.

Now I don't, for half a second, suggest that the questions that I articulated are the only ones but before you're done I want you to focus on them.

I don't think this is a classic piercing the corporate veil analysis as much as it's an agency analysis. But I'll hear your respective views on that if you want to be because I'll readily confess that I read a lot of paper and that while I obviously have some reactions to it, as I shared with you, this matter is still very much jump ball and will be until you complete your oral arguments.

So since I have concerns with both of your positions, I think I'll hear first from Mr. Catalanello and then from Mr. Crawford. And so you can plan your lives, Mr. Catalanello, I will give you a chance to reply and I'm going to give you, Mr. Crawford, a chance to surreply verbally but hopefully at much less length than all of the paper you guys already gave me.

Come on up to the main lecturn, please, Mr. Catalanello.

MR. CATALANELLO: Well thank you, Your Honor.

We are here today in connection with a motion that was filed by Chemtura which seeks summary judgment expunging the claim of NPC Services Inc. For purposes of the hearing I'll

refer to that just as NPC in its entirety.

The motion, as Your Honor just indicated, was fully briefed pursuant to a prior scheduling order entered by the Court back in May.

The claim at issue, Your Honor, is a rejection damages claim and it was filed in response to the debtors' rejection of the underlying NPC contract, which Your Honor also briefly described a few minutes ago. That contract was entered into pre-petition by Chemtura, along with seven other potentially responsible parties, PRPs or, as referred to throughout all of these lengthy briefs, the industry defendants on the one hand and NPC Services Inc. on the other.

The claim at issue at this proceeding is annexed to my certification as Exhibit 5 and was filed in the amount, in the approximate amount of 12.8 million dollars. It has two components, Your Honor. Approximately four million of the claim represents alleged future remediation and monitoring costs allocable to Chemtura, to be conducted at the PPI site, the Petro Processors Inc. site in Louisiana. And a second component, approximately eight and a half million dollars, which is a so-called 200 percent risk premium.

The motion that we're here to argue and debate today does not challenge the underlying components of the claim, Your Honor. Rather, as I said, the motion seeks expungement of all or, at a minimum, the future component of the claim.

THE COURT: Do I correctly deduce that if you don't win either now or on your home run objection, you would be raising issues on the numbers underlying those, especially the risk premium?

MR. CATALANELLO: That was going to be my next sentence, Your Honor. Exactly.

THE COURT: But your opponents seem to recognize that and they say that the numbers aren't before me today.

MR. CATALANELLO: That's correct, Your Honor. We agree on that.

THE COURT: Okay.

MR. CATALANELLO: In sum, Your Honor, the motion that is before the Court today can be broken down into two sections, two parts. The first section seeks expungement of the claim in its entirety, filed by NPC, on the basis that NPC has suffered no damages given the reallocation mechanisms built into, as I will argue shortly, the contract itself. That's the 12.75 percent allocable share for Chemtura.

The second section of the brief or the motion gives an independent basis for expungement of those components of the claim, Your Honor, that seek the future costs of remediation and monitoring, which I believe -- I believe is just about the entire claim. But again, we're not here to debate that particular minutia, if you will. But I think it's the entire claim. The basis for expungement, that independent basis, is

Section 502(e)(1)(B) of the Bankruptcy Code.

Given the facts at hand and arguably, or not arguably but understandably there are a number of facts, the section 502(e)(1)(B) analysis has two branches. It has two branches. The first is satisfaction of the three elements of 502(e)(1)(B) if, as we allege, NPC is merely an agent of the industry defendants.

The second branch of the 502(e)(1)(B) argument, Your Honor, the satisfaction of the three elements required if, as NPC alleges, they themselves or itself has a claim in this case for 12.8 million dollars. Either way we contend we get to the same result, which is expungement under 502(e)(1)(B). And it's actually there, Your Honor, that I'd like to begin the presentation on 502(e)(1)(B).

The starting point, under 502(e)(1)(B) is that we contend that NPC has filed the claim as an agent of the industry defendants. That, of course, leads us, necessarily, to Louisiana law on agency. The good news is we don't dispute the law. The law is laid out in a number of cases cited in both of our briefs, in particular the Cajun case, but for brevity it's the restatement.

THE COURT: You're not contending that Cajun is wrong in any way, the issue is simply how the principles set forth in Cajun should be applied to the facts we have here?

MR. CATALANELLO: That's exactly right, Your Honor.

WE don't dispute the underlying components of Louisiana law as articulated in Cajun. It's the application to the facts at hand.

THE COURT: Okay.

MR. CATALANELLO: An agent is one who acts in place of another with authority. The key test, and again Mr. Crawford and I don't dispute this, the key test is control. Control.

Now, let's look at our facts and circumstance. Before I get into the particular documents, Your Honor, which I think unquestionably demonstrate control, let's just step back for a minute and understand, more at a 30,000 foot level, the relationship amongst the parties.

You had, way back when -- I was in high school -- way back when you had a lawsuit that was commenced by the federal government. At some point in time the State of Louisiana intervened.

THE COURT: We're talking about shortly before 1983?

MR. CATALANELLO: Correct, Your Honor. You had a lawsuit by the federal government and at some point the State of Louisiana intervened with respect to this PPI site and circle all the relevant state and federal statutes.

At that time the industry defendants, including Chemtura, they got together and they recognized that there probably was going to be a finding of some liability with respect to that site. And so what those parties did is they

entered into the first document, the one you mentioned earlier which is the settlement and compromise or the settlement agreement. It's the first important document in the series of documents which give rise to this relationship by and among these parties. That document contemplated that there was going to be cleanup and it was going to allocate the cost of that cleanup amongst the parties.

The second document that comes along is the underlying consent decree, a few months later, two or three months later. They all get together --

THE COURT: So I flip-flopped the order when I described them in my preliminary remarks.

MR. CATALANELLO: I've done it in my head many times, Your Honor.

THE COURT: Okay.

MR. CATALANELLO: But the consent order comes next. The consent order comes next. The consent order is with the government, the settlement agreement is not. The consent order is with the government.

The consent order, as I'll talk about in a minute, requires all the industry --

THE COURT: Pause please, Mr. Catalanello.

MR. CATALANELLO: Sure.

THE COURT: Although it was chronologically executed first, or at least first conceptually, it was, in essence, a

game plan amongst the remaining defendants to satisfy the obligations to the government that would be satisfied under the consent decree?

MR. CATALANELLO: Right, Your Honor. I mean, the way, as a non-environmental lawyer, the way I see it, they got a jump on what ultimately would be a fight over 113, how we're going to allocate the cost of remediation because remediation was coming. It was coming. The question is whether they were going to agree with the government or there was going to be some kind of trial with respect to their obligations. So they did a little bit of a jump start, if you will, and they entered into that settlement agreement. Consent decree follows. Consent decree secures the obligations the industry defendants have with the government and we'll get into that document in a moment.

The next thing that happens is they create NPC. Why? Seven or eight very large companies that had to have this remediation completed, how were they going to do it? Well, they weren't going to fight amongst themselves. So they picked one entity, they create one entity, to perform the work. And we're going to get into the differences shortly about DSG Trust that we're all very familiar with and why DSG Trust is completely different than these facts and circumstances. But they create NPC for this specific role. That's the high level. That's the 30,000 foot, sort of, context that we now find

ourselves in.

Now let's go to the specific documents that I believe demonstrate an agency relationship. I'm going to start with the consent decree first. I'm going to flip-flop them again. The consent decree, which is Exhibit 1 in my certification, that document itself dictated that the industry defendants were going to appoint a third-party representative. What does it say? At paragraph 20 it says, and I quote, "The industry defendants" --

THE COURT: Give me a second, please. Pause please, Mr. Catalanello.

MR. CATALANELLO: Certainly

THE COURT: Did you say paragraph 20?

MR. CATALANELLO: Yes, Your Honor.

THE COURT: Beginning at the bottom of the page?

MR. CATALANELLO: Yes, Your Honor.

THE COURT: I'm with you.

MR. CATALANELLO: And I quote, "The industry defendants shall appoint a remedial plan coordinator, RPC, to implement the remedial design and monitoring plants," paragraph 20.

Now let's go to the second document, it's the settlement agreement Your Honor. Now that comes up in two places in the documents we gave the Court. It comes up as a standalone Exhibit 2 but it also comes up as an attachment, if

you will, or behind the consent decree. But it's in the record, Your Honor, as Exhibit 2.

That settlement agreement, like the consent decree, contemplated the appointment of a third-party representative. It says, at page 5, and I quote, "The industry defendants shall jointly designate a representative or separate entity to implement the remedial action and carry out the additional maintenance and monitoring required by the consent decree".

Okay. So we've got the consent decree, we've got the settlement agreement. Now the next very important step occurs in the beginning of this, what we believe, agency relationship and that's the creation of NPC.

As we said throughout our papers, Your Honor, we believe that NPC was formed by the defendant companies, is comprised of the defendant companies and is for the benefit of the defendant companies.

Now let me get specific. First, NPC's shareholders, since its founding, have been and always will be the PRPs identified in the consent decree. That's first.

Second, the members of NPC's board of directors have been and always will be the representatives of the PRPs identified in the consent decree with one exception. The exception is the bylaws do provide that NPC, it's president Mr. Dawson who submitted an affidavit, can sit on the board. I'll tell you why it really doesn't matter in a minute, but the

board itself are the shareholders, which are the industry defendants, and Mr. Dawson.

Record reflects that NPC is not-for-profit entity that was organized, and I quote, according to the articles of incorporation, Exhibit 3, Your Honor, to my certification, and I quote, "And it shall be operated exclusively for the purpose of carrying out and/or supervising the cleanup of hazardous waste sites". Right in the articles of incorporation, Exhibit 3, article 3.

Now, it gets better. The corporate powers and the management of NPC are vested in the board. Again, the board has to be the members who are the industry defendants. That's article 5 of Exhibit 3, Your Honor.

Articles of incorporation go further and they provide that the corporate powers and management of NPC shall be vested in and exercised by a board of directors of three persons. It was expanded to five, as I said, later in the bylaws. Articles say three, bylaws, which trump, say five. You've got four PRPs, industry defendants and then Mr. Dawson.

Very important, Your Honor, the bylaws make clear that you need an affirmative vote of four members of the board to act. That's article five.

THE COURT: That's four out of five?

MR. CATALANELLO: Correct. You need four out of five. The organic documents, Your Honor, further provide that NPC's

board of directors "Shall be charged with the management of all of the affairs of the corporation subject to the provisions of the articles of incorporation and bylaws". It's Exhibit 3, article 2. Those are the bylaws, Your Honor.

Now the bylaws go further to say, and I quote, "That the president," which is Mr. Dawson, "must see that all orders and resolutions of the board are carried into effect." It's Exhibit 3 of the bylaws, article 1, page 1.

THE COURT: Pause please, Mr. Catalanello.

MR. CATALANELLO: Yes.

THE COURT: Because what you just said seems to be subject to a double entendre or multiple inferences. One, of course, is the argument you're making but the second is that the board of directors is acting as boards of directors typically do, acting to manage the company and, presumably consistent with any fiduciary duties they would have as directors. But I haven't heard you say yet that they're love slaves of the people who put them on the board. I mean, that they're required, as directors, to do what whoever nominated them said they were supposed to do.

And that is one of the reasons why I'm still inclined to believe there's an issue of fact. I need to know what understandings there were about how the board was going to implement its responsibilities.

MR. CATALANELLO: Okay. Your Honor, just so I'm clear

with the Court, the board members, the four board members, have to be -- have to be shareholders of NPC. The shareholders have to be --

THE COURT: And I take it that various defendants put their guys on the board, so to speak. But, you know, those of all who follow corporate governance matters over the years have always wondered, I think I know, but when, you know, somebody has the right to put somebody on the board, once they put that person on the board I'm not sure, unless the charter or bylaws answer the question, as to whether that board member is allowed to do what his nominator wants him to do or whether once he's on the board he still exercises his ordinary fiduciary duties.

MR. CATALANELLO: I can understand the Court's question but let me try to put it in context. This is not the situation where one of these industry defendants designated somebody from their shop, if you will, to sit on the board of an independent company. That's not the situation.

The situation is exactly the opposite. They created NPC at the same time that they were binding themselves contractually, under the consent decree with the government. And at the same time that they were binding themselves contractually under the settlement agreement to carry out jointly, and we'll get there in a minute, jointly the obligations required under the consent decree.

It's different, Your Honor. It's different because

everything here that we're talking about, everything here was structured to ensure that these industry defendants were going to carry out the obligations that were required of them under the consent decree and they were going to do it as the consent decree and settlement of compromise contemplated, with an entity, but that entity was going to be controlled by them. And that's why these documents provide for very specific control mechanisms over governance. It's different, according to us.

Let's move now, Your Honor, to the NPC contract. Again, in the waive, if you will, or in the list of documents which we believe give rise to an agency relationship, the NPC contract, we think, confirms the relationship. And by the way, that's Exhibit 4 to my certification, Your Honor. I'll quote two particular provisions. One is in article 1 and it says, "NPC shall, in an expeditious and workman-like manner, undertake and complete all work called for to be done by defendant companies in the consent decree".

It goes further. "This work shall not be considered a construction undertaking but rather an undertaking to fulfill the requirements of the consent decree and shall be subject to the terms set out in that decree". That's article 1 of the NPC contract, Exhibit 4 to my certification.

The second provision I'd like to point out, Your Honor, is found at article 12. What that provision says, and I

won't quote, what that provision says is that if NPC is going to go out and contract for anything over 500,000 dollars a notice has to go out to the other defendant companies to let them know that there was going to be this -- essentially this contract. The defendant companies could object to it but ultimately the contract, and here's what I think it's important Your Honor, the contract says that "The final decision as to such contracts shall be left to the board of directors of NPC". Again, all goes back to the board. The board, of course, is controlled by the industry defendants.

Now let's go to the next document in the chain of documents which we believe shows and demonstrates very clearly the agency relationship, that's the proof of claim. That's why we're here today. Proof of claim, Exhibit 5 to my certification.

Well, how did they file the claim? Well, they filed the claim on its own behalf and, I quote, "On behalf of the defendant companies". It's right in the claim. Let's be clear, none of the industry defendants filed a proof of claim. The only claim filed dealing with the rejection of this contract is the one filed by NPC.

How is the claim described? Well, it's described as a "Consolidated damage claim asserted by NPC on behalf of the defendant companies" other than the debtor, of course. It goes on to say, "That the claim reflects the debtors' expected

unpaid share of all future cleanup costs which results in a higher proportionate share of those costs being occasioned upon the remaining shareholders". Now that's important because that's consistent with the settlement agreement which, as Your Honor noted earlier, has an allocation mechanism. We dispute whether it applies and we'll get to that later in my presentation. But it has, indisputably, an allocation mechanism. And what does it say? Well, it says that the industry defendants reserve their rights as against the non-complying industry defendants. It's the orphan's share. It's the orphan's share and it says, well look, if we're going to have to step up and pay for a non-defaulting industry defendant, well we're going to reserve our rights against that entity because we're paying it's share. Here the share in question is 12.75 percent. We don't believe that the claim asserts anywhere that NPC has suffered a damage. But again, we'll get to that in a minute.

Now let's go to the last document in the chain of documents that we believe demonstrates an agency relationship and that's the Dawson affidavit. I didn't see anything in that Dawson affidavit which disputes that this board is controlled by the industry defendants who are the shareholders, who are the same parties who are bound by, contractually, the settlement agreement. The same parties who are bound under a federal consent decree. There's nothing in that Dawson

affidavit that disputes it.

What Dawson says, in six or seven pages, is that he runs the day-to-day operations of NPC. Okay. We don't dispute that. But it's a bit illusory. It's a bit illusory because we just went over the organic documents of NPC. Mr. Dawson sits on the board but he can't do anything. And I'm not attacking the man, I'm sure he's doing a wonderful job, but he can't control NPC. NPC is controlled by the industry defendants. It's right in the organic documents.

Okay. We think, Your Honor, that everything, everything in that chain of documentation, which is all in the record, demonstrates that NPC is controlled by the industry defendants and that's why we think, because we started out a few minutes ago, a critical element, control, agency, Louisiana law, that's been satisfied.

THE COURT: Okay. If that's everything you have on agency now turn to the no damage contention.

MR. CATALANELLO: Your Honor, I can do that. I wanted to just complete the 502(e)(1)(B) analysis because it's -- I know our briefs were very lengthy and probably confusing. But ultimately, Your Honor, as I started out, you have two branches under 502(e)(1)(B). The first branch that we take the Court through is if NPC is an agent why we can establish the three elements of 502(e)(1)(B).

The second branch, of course, is if, as NPC alleges,

we're not an agent.

THE COURT: Okay. Here's what I need your help on.

MR. CATALANELLO: Okay.

THE COURT: And I'm not going to put a sock on your mouth but you've been talking for a while. I know that this is a big matter but I don't want to go on forever.

MR. CATALANELLO: Yeah.

THE COURT: If you're talking about the other industry defendants being -- meeting 502(e)(1)(B) requirements, I don't need a lot of help on that.

MR. CATALANELLO: Okay.

THE COURT: I would even speculate that that's why they didn't file their own proofs of claim, that would have been a difficult thing to achieve.

But if you're seeking to apply 502(e)(1)(B) to NPC on other than agency grounds, I need help on that because it's the co-liability requirement of the tripod that troubles me there.

MR. CATALANELLO: And Your Honor, that's where I was going to go.

THE COURT: Okay.

MR. CATALANELLO: I was going to go right to co-liability assuming -- assuming for a moment that this Court cannot find an agency relationship at this particular hearing. Let's just go down the branch, it's NPC's claim there's co-liability. We think we get there -- we get there two ways,

Your Honor. It's a different analysis, slightly, but we get to the same place.

Where do we start? We start with the consent decree. The consent decree provides, at paragraph 2, it's Exhibit 1, Your Honor, to my certification as follows: "This decree shall apply to and be binding upon the parties and upon officers, agents, employees, contractors, successors and assigns of the parties". That's the consent decree.

Now next we turn to the NPC contract. Article 1, it's the paragraph I quoted earlier. It's not that they're just going to perform work, they've agreed, contractually, to undertake and complete all of the work required to be done by the defendant companies under the consent decree. It's very clear. There may be some ambiguities in certain parts of that contract, that's not ambiguous. That's very clear.

It's clear, because as we said earlier, we understood the context of that relationship. We weren't going out to a third party and saying, hey, we need you to perform some work. They were creating an entity to undertake and perform the work that they were all bound to perform jointly under the consent decree.

The contract goes further, at article 1, to say it's not a construction undertaking. But again, it's an undertaking to fulfill the requirements in the consent decree. Take the consent decree, take the contract and now you put it in the

context of creating NPC to perform that work.

Now, I'm not attacking the underlying existence of NPC. I know Mr. Crawford spent some time in his initial reply brief arguing alter ego and why it didn't satisfy the elements. I'm not going to down that road. I'm not saying it's an alter ego. I'm not saying that. But what I am saying is let's call NPC for what it truly is. It's an entity that has assumed the obligations of the industry defendants to perform the work that is required to be performed jointly under the consent decree.

If that work's not performed, Your Honor, for any reason, guess who's coming? The federal or state government. They're going to sue everybody or at least they could sue everybody to perform the work. They knew about NPC. They knew everything that went into the creation. The consent order contemplated designating an entity to do it.

Now, co-liability under 502(e)(1)(B), and I know Your Honor's written a lot about that in the context of Lyondell, two decisions in this particular case, by Diacetyl and Environmental, made it clear. Co-liability is unique in the context of 502(e)(1)(B). The Wedtech decision, which we cite in our brief at 85 B.R. 285, we believe makes it also clear that it does not apply only in instances where there's a finding of liability. We don't need that. It would be nice but you don't need it for 502(e)(1)(B) purposes and in the Drexel Burnham decision, Your Honor, at 142 B.R. 82 also stands

for that proposition.

In this Court's Lyondell decision, 442 B.R. 236, Your Honor analyzed co-liability in the context of 502(e)(1)(B) and said, and I quote, "Section 502(e)(1)(B) imposes no requirements as to how or why the party asserting the claim, potentially subject to 502(e)(1)(B), must be liable with the debtor on the claim of a third party".

Your Honor goes on to state, "There is no statutory requirement, for example, that the debtor and the party asserting the claim be liable on the claim of the third party in the same action under a common statute or on the same legal theory". That's at page 244, footnote 10 of your decision.

Indeed in this Court's separate 502(e)(1)(B) decision where a claimant, it was Dow, Your Honor, in that particular case; the claimant was voluntarily cleaning up hazardous waste. This Court said that that doesn't get you out of 502(e)(1)(B) co-liability. There could be liability down the road.

Now, I'm going to stop for a minute and answer your question. This particular site was not the subject of a settlement agreement with the federal government or the state. It wasn't. Could the government come in down the road and assert that all of us are liable? I'm not conceding any liability. But could they? Sure. Sure.

We know because in this very court there was a dispute as to whether or not the government even had to file a proof of

claim, which is not uncommon in the context of CERCLA. So this site is not captured by any of the other settlement agreements. Certainly not the EPA settlement agreement. As far as I know, Your Honor, Mr. Bruin's is in the courtroom with no other state, including the State of Louisiana.

502(e)(1)(B) co-liability is so unique that this Court and other courts, including, I believe, Judge Shannon's decision in the APCO case, which we cite, and Judge Bushman's decision in the Wedtech case, stand for the proposition that you don't even have to have a proof of claim filed by the third party creditor. Don't need it.

All of these cases, we believe Your Honor, point or lead to the conclusion that for purposes of 502(e)(1)(B) NPC is co-liable with all of the industry defendants to perform the work required by the consent decree.

Now I'm going to stop for a minute because we debated this back and forth over the last few months and I just want to highlight this. I'm not saying -- I'm not saying that if the industry defendants went out and hired ACME, ACME Sludge & Cleanup Company, they hire ACME. And they say to ACME we need you to go and get your bulldozers and get rid of this potentially wasted material, that if ACME doesn't perform, well ACME now is bound to perform everything. I'm not saying that. That's not logical.

What I am saying is, in this context, given everything

we mentioned, everything I've discussed, the creation of NPC for the benefit of the industry defendants, contemplated by the consent decree. What I'm saying is, it's different. What I'm saying here NPC has necessarily assumed those obligations because of who it is, what it is, why it was created. That's what I'm saying, Your Honor.

Now the DS&G Trust case, well we looked at that a lot. Had to because it's out there, but it's different. It's different. The record on DS&G is not the same record that you have here today. Our record demonstrates that this entity, according to the articles of incorporation, was to be operated exclusively for the purpose of cleaning up the site. That's what it says.

DS&G is not an agent. There's no mention of any beneficiaries in their proof of claim. They file it for themselves. That's how they file their proof of claim. The work -- the work to be performed by DS&G, there's nothing in the record. It was almost like an administrative entity. It was just going to collect funds and then cut checks. That's not NPC. NPC here is performing the work, we know that. The contract says it. They don't dispute it. It's very, very different. It's an undertaking, that's the words, undertaking to perform. Those are the words that are used in this contract.

Finally, the contract itself is in the record. In

DS&G Trust there was no contract in the record, not at that time. It's a different relationship. Here, unlike DS&G Trust, NPC clearly was created for the benefit of the industry defendants.

Now, in addition to that Your Honor, as I said there are two ways you get to co-liability. In addition to that, sort of, sub-branch, if you will, you get there another way. Well how do you get there? Co-liability exists because both the debtor and NPC are liable under the terms of the contract. We're all liable. We're all liable. Well, who are we liable to? We're liable to the other industry defendants. We have to perform. As the contract says, if we don't perform --

THE COURT: Pause. You're saying liable to the other industry defendants or are you -- but you're not saying to the United States government or the state of Louisiana?

MR. CATALANELLO: Right. But it's for the amount of the claim. What I'm saying is, the underlying claim, 12.8 million dollars that they have asserted against Chemtura, represents Chemtura's alleged 12.75 percent allocable share of cleanup costs. That's the claim we're talking about. The duplication. The claim.

Well, who are we liable to? We're liable to the other industry defendants to perform. Was NPC liable? Liable to the other industry defendants, they contractually agreed to perform the work. It all runs back to the 12.85 million dollars. What

I'm saying is, yes different creditor, it's not the same third-party creditor as the government in the first branch. But what it is, it's the same debt, 12.85 million, owed under the contract to the other industry defendants. We think that's a separate way you get there. First way you get there is a debt owed to the government but there's a second way. Either way we think co-liability -- co-liability is demonstrated, Your Honor.

Now let's go to some of the questions I haven't answered which deals with the triggering event, if you will, the joint and several. It's an independent basis to expunge the claim. It has nothing to do with 502(e)(1)(B). We take the position that NPC itself has not alleged or cannot allege that it has suffered any damage.

Well, why is that? Because of the allocation provisions in the contract. A specific provision, where is it found? Well, it's found in the exhibit to the contract, Your Honor, that the Court mentioned a few moments ago. It's in the payment section which I believe is article 5 of the contract that incorporates Exhibit A -- I'm sorry; it's article 2, Your Honor, of the contract which incorporates Exhibit A. And Exhibit A, of course Your Honor, says, and we don't think there's anything ambiguous about it, it says that "Each defendant company shall pay the share of the contract price stated in that certain agreement of settlement and compromise of disputed liability dated December 16th, 1983 as amended".

Well that's the agreement, Your Honor, that has the reallocation provision. It's built right into our contract. I know NPC disputes it but I don't see how they can.

Now, much is made throughout these briefs, and I apologize for it, of joint and several and whereas clauses and it's a little bit of a confusing sort of chain, if you will. But what's clear is the consent decree itself. The consent decree itself represents a joint obligation of all of the parties to perform the work. That can't be disputed, Your Honor.

THE COURT: Help me find the clause that says that.

MR. CATALANELLO: Yeah. There are a number of them, Your Honor. If we go to Exhibit 1 to my certification, which is the consent decree -- I'm going to quote a number of provisions of the consent decree, Your Honor. We can start with, Your Honor, paragraph 14 of the consent decree which states that "The industry defendants shall implement the remedial actions for both sites as provided in this decree".

I'm going to stop for a moment. There's nothing in this consent decree that talks about allocation. Now, the government recognizes that industry defendants may go off and have their own separate allocation, but that's not with the government. That's just with the industry defendants themselves. The consent decree, at paragraph 14, and there are a number of paragraphs that I'll get to, talk about the

industry defendants shall do things, they're going to implement the remedial actions of paragraph 14.

Paragraph 23, Your Honor, talks about the industry defendants shall cause the work to be formed hereunder within the time limits set forth herein. Paragraph 26 and 27 talk about the industry defendants paying money to the federal government, it was about 600,000, to the state government about 30,000. It doesn't allocate it. Jointly they have to do it.

THE COURT: Forgive me but I had read paragraph 14 as saying that of course each of them is on the hook but they're not liable for the entire thing, they'll implement what the schedules established in the various plans and in the second paragraph of 14, you know, again it's a reprise of the insolvency provision, "To complete all such activities and actions on such basis of contribution as shall be agreed upon by them". Which, at least seemingly, does not say that each of them is responsible for the entirety of the costs of the project, it's just billing up to the bar to plug a hole.

MR. CATALANELLO: But Your Honor, we get to the same place, which is ultimately they have a joint obligation to do this work, to pay these amounts under those paragraphs. And then there's a recognition that if there's an insolvency or an inability to pay, it doesn't say when or how, it just says an inability to pay, if any one of them it recognizes and requires that the other defendants, as you just said, step up to the

plate. And they can figure out how to step up to the plate but that's not the government's problem. That's an allocation among themselves. Again, almost like they got a jump on 113 and contribution but that's not the government's problem. That's between the parties who entered into the settlement agreement, not the government.

But ultimately, Your Honor, all of these provisions, and I would argue this provision makes abundantly clear that the work has to be performed and if it's not performed, they're all going to be hit with some kind of enforcement action or some type of additional claim, Your Honor.

Now, we believe the NPC contract likewise acknowledges that the industry defendants' obligations are joint. If you look at the third whereas clause, Exhibit 4, Your Honor, to the contract. The third whereas clause says, and I quote on page 1 of the contract, "The defendant companies wish to complete these studies and actions which must be undertaken jointly under the decree". They recognized it. They're all jointly liable under the consent decree, Your Honor.

Again, how they were going to whack it up, that was left for the contract. That was left for the contract but that's not the government's concern. And it's not surprising, Your Honor, because there's joint liability under CERCLA and applicable or similar state statutes, they're all going to be on the hook. And again, then there would be an allocation

based on 113 of contribution requirements, but they're all going to be on the hook. They recognize that.

So Your Honor the contract, yes, they entered into the contract there's several. I get it. I saw it. We don't dispute it. They entered on their own but what does that really mean in the context of joint liability under the consent decree? What does that really mean when the exhibit attached to the contract, it's not a separate document here it's attached. The exhibit incorporates the reallocation mechanism. It incorporates it because it incorporates all of the terms and conditions of the settlement agreement. So what does several really mean? In this context we don't think it means anything for purposes of this analysis. It just doesn't.

Now, I heard your concern and question about insolvency or other inability and we tried to address that in our papers. And Your Honor, the way we approached that is as follows: At the time of the bankruptcy filing it's undisputed we couldn't pay it, pre-petition debt, couldn't pay it. I don't believe, Your Honor, and I'm certainly not challenging the Court but I don't believe there's ever been a finding of solvency. No, I get it, just equity had value under a plan that was agreed to, there was never a finding of solvency.

But it's clear that at the time of the filing, as a matter of law, we couldn't pay the pre-petition debt. We couldn't pay it.

THE COURT: But contrary to what's been said by certain district judges, there's no requirement that you be insolvent to file a Chapter 11 petition.

MR. CATALANELLO: Right. Right. But the contract doesn't just talk about insolvency; it talks about or other inability to pay. That's what it says, it's insolvency or other inability to pay, those are the exact words.

NPC could have, I suppose, made some kind of motion, run in here, some kind of relief to force us to pay, they didn't do that. Nobody did anything, of course, other than they filed the rejection damage claim which is treated as a pre-petition rejection claim.

THE COURT: So then you get to the issue as to how a guy like me, a judge like me, should deal with the situation where the inability to pay is temporary. And you want to give -- I'll certainly want to hear what Mr. Crawford has to say about that as well, but do you want to, since you're up there, give me your view on how I should deal with it?

I take it, from what you're saying, that you're saying that a temporary inability to pay gives you a permanent get-out-of-jail free card on that.

MR. CATALANELLO: That's right, Your Honor, because the contract doesn't say otherwise. The contract doesn't say otherwise and in fact what happened here, and it's Exhibit 6 in the record, is NPC went out to the other shareholders and

essentially pro-rated, and that's the word that they use, they say that as of today Chemtura has not come out of bankruptcy and their share is still being, "pro-rated" among the other shareholders. They, themselves, were operating under the terms of the settlement agreement and the reallocation provisions. They were reallocating. The proof of claim talks about a higher proportionate share of the damages to be suffered by the industry defendants.

So I would say, Your Honor, that's correct. There's nothing in the contract that says it has to be a permanent inability. It says inability. It was an inability, without question an inability because it was pre-petition and they couldn't pay it.

THE COURT: The flip side of that, of course, is that Chemtura's fully capable of paying it now.

MR. CATALANELLO: I don't dispute that, Your Honor. There's a DCR in place that provides for the payment of claims. We believe it'll pay unsecured creditors a hundred percent. There's no guarantee of that anywhere in any of the documents but I understand -- I understand the Court's concern. But we don't think we have to get there because it's an inability to pay. At the time that we filed we could not pay, a matter of law.

So Your Honor, we do think there was a trigger event. We think that they, most importantly, NPC, has operated as if

there's been a triggering event. That's the most important evidence. I can say all I can say about words, but it's the conduct of NPC that's very important. And I know there's something in the record here about these loans, I'm sure Mr. Crawford will talk about that, I don't know where, in any of these documents and most importantly in the consent -- the settlement agreement, it talks about loans. There's nothing in the settlement agreement about loans, there's nothing, cer4tainly, in the bylaws or the articles of incorporation. The only thing we have that deals with the orphan's share, because that's what it is, is the allocation and reallocation mechanism. That's the only thing that's in the record.

People can write letters all day long saying, you know, this is for a loan, where's the authority for a loan? I didn't see anything in the record that gave the board -- did the board approve loans? Nothing in Mr. Dawson's affidavit that said that. I didn't see any resolution authorizing loans. Why? Because I think it's inconsistent with the document, inconsistent with the proof of claim, inconsistent with that letter they sent to the shareholders, the industry defendants which allocated Chemtura's orphaned share. So we think there was a triggering event, Your Honor.

That's all I really have to say on that, if the Court has any other questions.

THE COURT: Okay. Does that take care of it?

MR. CATALANELLO: It does, Your Honor.

THE COURT: Thank you.

MR. CATALANELLO: Thank you.

THE COURT: Mr. Crawford, we went on for a while. Let's take a little less than ten minutes, until ten after 11 on the clock and then I'll hear from you.

MR. CRAWFORD: Okay. Thank you.

(Recess from 11:03 a.m. until 11:13 p.m.)

THE CLERK: All rise.

THE COURT: Have seats, please. Okay. Mr. Crawford.

MR. CRAWFORD: Thank you, Your Honor.

I believe I will be brief on this, as I think you acknowledged, we have briefed this extensively and I'm going to try to stick to the things that I think you asked of me and certainly any follow-up questions that you have. And I am going to talk about agency, I think it's important, some things that need to be said about agency.

But before I forget, I'd like to address something that was raised right at the end of Mr. Catalanello's argument, which dealt with temporary inability to pay. I would just suggest, respectfully Your Honor, that if that were the law or the case here any inability, for even a very short period of time, let's say God forbid another hurricane hit Louisiana and one of these industry defendants was unable to make its payment for two weeks, does that mean they're excused forever? I don't

think so. There's nothing in the record to suggest that a temporary inability to pay is some grounds, somehow or another, for these industry defendants to be relieved of any obligation they have to NPC to pay for the remediation costs.

Now with that being said, the agency issue, and we did brief this, we went back and forth, I'll try not to belabor the point, but Your Honor recognized what I was going to focus a lot on which is, as I'm aware anyway, corporate America is governed very similarly to this. Every corporation in America has bylaws, articles of incorporation, establishes a board, the president answers to the board, the officers, there are fiduciary duties that flow from that. And essentially what the reorganized debtors would have you do today is make a finding that simply because a board of directors has governing authority, if you will, over the officers of a company, that that somehow transforms every corporation in America to an agency-principal relationship and that can't possibly be the law, Your Honor.

I will point out something that, kind of, sets forth or establishes that that's not the case even here. And the articles of incorporation that Mr. Catalanello referred to extensively during his oral argument, there was one article that he did not allude to, which is article 11 and it goes right to the Cajun Electric inquiry under Louisiana law as to whether an agency -- a principal-agent relationship has been

established.

Article 11 says no stockholder of this corporation shall ever be held liable or responsible for contracts, debts or defaults of this corporation, nor shall any mere informality in organization have the effect or rendering the articles of incorporation annulled.

That's an important point because in the Cajun Electric case Judge Schiff made a big deal out of the issue of whether Cajun Electric, as the alleged agent of Gulf States Utilities, had the ability to bind Gulf States Utilities to contracts to third parties. So taken that in this case, the ability of NPC services, for example, to bind Chemtura with respect to its subcontract relationships or what have you in the course of cleaning up this super fun site.

The -- if this isn't -- if NPC is the agent of these shareholders, which we submit to you there is no evidence in the record to suggest that, but if they are that means Chemtura, in effect, is personally liable for all the debts of NPC as its agent.

THE COURT: Are they a hundred percent congruent? I can certainly see how the distinction you're making could make Cajun Electric a little less on point than it might otherwise be. But from the perspective of a bankruptcy judge, the question is not whether Chemtura or any of the other companies that were defendants could be held liable for NPG's (sic)

obligations. But rather when NPG (sic) is being used as an intermediary for the benefit of the others and that's why I cared so much as to the extent, if any, to which the various shareholders, not because they're shareholders necessarily but for whatever reason might be able to tell NPG (sic) what to do or to use NPG (sic) as the instrumentality for their benefit. That does not strike me as exactly the same question as the one you articulated. I don't think it follows that because Chemtura wouldn't be liable for NPG (sic) debts, various companies in the NPG (sic) family could tell NPG (sic) what to do.

MR. CRAWFORD: You're right, Your Honor. It is different but Louisiana law, which is what Judge Schiff was looking at in Cajun Electric, that case talks about the legal effects of a mandatory, we call it in Louisiana, same as an agent, and principal relationship and that is one of the consequences that flow from it. That was the point I was making.

THE COURT: Forgive me, Mr. Crawford. Did he consider that as determinative or as one of several factors that you would look at?

MR. CRAWFORD: It was one of several factors. It was.

THE COURT: Okay.

MR. CRAWFORD: And Mr. Catalanello is correct; it is an issue of control, okay. And so at the very -- at the very

beginning of all of this, I would submit to you that there has certainly been no showing whatsoever in the record that there has been a factual finding, that that necessary control was exerted by the shareholders over NPC. To the contrary, the only fact-based affidavit in the record, by Mr. Dawson as the president of NPC, made clear, we believe certainly, that Mr. Dawson makes the decisions for the company. It's like any other company, certainly. The board of directors ultimately has some say so but I think Your Honor pointed out, better than I could have, that these board members of NPC are not Exxon, Dow and Shell. They are representatives, individual human beings, that serve on the board of NPC and they have separate fiduciary duties to NPC as a company and there is nothing in the record, certainly on a summary judgment, that would suggest that say, for example, Exxon directly told Bill Dawson what to do with respect to the cleanup of this site. It's not in the record.

So at best, at best Your Honor --

THE COURT: You guys fight another day.

MR. CRAWFORD: -- we fight another day. We suggest that there's enough in the record for you to make a finding that NPC is not the agent of the shareholders. But as you say, at a minimum we fight another day.

I would like to talk, and I'm not going to go on and on about veil piercing, but the reason we went that route is

because in effect what they're trying to do, by summary judgment, is disregard NPC as an entity. All of their papers suggest that we know what really happened here, NPC is not -- not a real entity. There's nothing in the record to suggest that's not the case. The affidavit of Mr. Dawson sets out, in painstaking detail, the separateness of NPC over almost thirty years.

Now I would like to -- and certainly the degree of control -- getting back -- one last point on the agency. The degree of control that Judge Schiff was talking about was a uniquely factual determination. Judge Schiff, you're right, I was there. I had the good fortune, I guess, of being one of the young lawyers for the unsecured creditors committee in that case. Judge Schiff had a full-blown evidentiary hearing on that issue as the opinion reflects. And so he didn't make a decision on the degree of control based on a summary judgment motion.

Now, the -- I'd like to talk a little bit about the contract. The notion of several not joint liability and how the contract before the Court relates to the other contracts. And I apologize, I'm not sure about other jurisdictions but in Louisiana if a contract is several it is distinct and apart from liability with anyone else.

I think one of the words in the contract that is very important, it hasn't been talked about a lot, is that the

contract is not only several but not joint but it's also separately entered into with each of the industry defendants and NPC.

So what we're talking about is a contract that was rejected by Chemtura, the several and separate contract between Chemtura and NPC. The contractual obligations of Chemtura, Dow, Exxon, et al, those obligations are set forth in the settlement agreement. Okay. And the relationship between the industry defendants and the government or environmental regulatory authorities, whether it be federal, state or local, those are set forth in the consent decree.

THE COURT: Pause please --

MR. CRAWFORD: Yes.

THE COURT: -- Mr. Crawford. Because there is, I think, very little debate or could be very little debate that each of the settlement agreement and the consent decree talk about the nature of the several obligations in much greater detail than the other contract, the 1984 contract does, the '84 contract, the June '84, I think it's June '84, contract says that they enter into the agreement severally. It doesn't say in baby talk, unless I missed it, that their obligations are several. Let me see where I developed that understanding from. It says in the "Now therefore clause" on the first page of the agreement, just before article 1, "It is agreed between each defendant, severally and not jointly".

I take it your point or your contention is that when they agree severally and not jointly, that means that their covenants are likewise several and not joint?

MR. CRAWFORD: With respect to NPC, Your Honor, yes. The rest of that, I think, is very important because it talks not only about several not joint, but right below that it also says and separately with NPC. And it says, "NPC Services Inc. separately".

THE COURT: But I take it your more fundamental point is that however you characterize that the settlement and the consent decree more specifically describe how each of them will have obligations and won't have obligations.

MR. CRAWFORD: Amongst themselves, correct. Remember, NPC is not a party to either one of the other contracts and this -- I call it the NPC contract because it's easier for me to remember since that's the only one that NPC was a party to.

THE COURT: That being the contract of June 8, 1984?

MR. CRAWFORD: Yes, sir.

THE COURT: Uh-huh.

MR. CRAWFORD: If it's all right I'll call that the NPC contract. I don't think anybody's arguing that NPC was a party to any of the other contracts. But I think that's a real important point because unlike a lot of contracts that I've read over the years, while the settlement agreement amongst the industry defendants and the consent decree are referenced in

this contract, and in fact attached, they don't have that language that says incorporated herein by reference. The only reference to the settlement agreement in the NPC contract is through Exhibit A to the contract and it refers to the percentages as may be amended in the future, the percentages that each of the industry defendants will be responsible for, in this case, to NPC on a several basis.

The reason that's important is, as we set forth in our multiple briefs, is NPC does not have the legal right to compel the other industry defendants to pay more. Now, whether we get loans, whether we get voluntary advances, all of those things may very well be true. But a several relationship, under Louisiana law, means you cannot sue someone else for that share, okay. So we're not talking about the federal government coming in and telling Exxon you've got to clean this thing up. I think you're right, you mentioned earlier that, you know, if we got down twenty years from now and God forbid Exxon was the only company left in America, I feel pretty confident that Exxon would have to clean this thing up.

But that's not what we're here on today. We're on a claim of NPC under this contract. So -- and our position is, we never get to that triggering event under the settlement agreement at all. We don't even get there. If we do get there, then we've got some issues of fact, again, better left for another day. But we don't even get there.

And the issue -- and that all goes back to the issue of whether NPC has suffered damage, okay. And the reorganized debtors go on and on in their briefs, they didn't mention it today but go on about mitigation of damages under Louisiana law. I'll just briefly mention that that is a defense, a very fact-based defense on whether someone has mitigated the damages. And oh by the way, that's a failure to mitigate damages that could result in a reduction of damages.

The extent of damages that NPC will and has suffered with respect to the rejection of this contract is a uniquely fact-based inquiry and there has been no showing that that decision is ripe for summary judgment. And I will agree that we -- we don't believe that you should enter a judgment for 12.8 million. We recognize the fact that there are factual issues on, you know, how much the damages are. We've cited to cases on that, that's not brain surgery by any stretch.

THE COURT: Pause please, there, Mr. Crawford because while I agree that it's not a today issue you hit something that had occurred to me when I was reading the papers. Under New York law, and I assume Louisiana law applies here, under New York law to be recoverable damages can't be too speculative. Does Louisiana have a similar law?

MR. CRAWFORD: Not at all. Not at all.

THE COURT: You can collect speculative damages under Louisiana law?

MR. CRAWFORD: Yes, Your Honor. Absolutely. And I would submit to you that under bankruptcy law, specifically a rejection damage claim, is by its very nature speculative. I mean, I know it's a pre-petition claim but when you're talking about breach of contract, that, by definition, is going to have a court look at prospective damages.

THE COURT: Prospective is one thing and maybe we have a play on words on what speculative means and I'll grant that it's not an issue for today, but there has to be a reasonable basis, under New York law, for computing the damages. Louisiana has no similar law -- similar rule?

MR. CRAWFORD: Oh, I'm sorry, Your Honor. I think I was focusing more on whether it was --

THE COURT: If you're talking future damages or that they're not liquidated yet, I think many people would agree with you. But --

MR. CRAWFORD: I'm sorry, Your Honor.

THE COURT: You have to have a reasonable basis for what you're asking for.

MR. CRAWFORD: Absolutely. Absolutely. And our affidavits set forth -- the affidavits filed not in opposition to summary judgment but with the original objection to the claim, those set forth in painstaking detail how we get to the 12.8 million.

I think the point is that we will, if we have a trial

on this we'll be able to show that those aren't speculative. There is a, as I appreciate it, there may be an unlimited ceiling on this but the floor is pretty solid. And by that I mean, as we put forth in the affidavit and we kind of laughed about it a little bit, it's almost ridiculous to think, but Mr. Dawson really thinks this is going to go on till the year 2500, so he won't really care much.

THE COURT: 2500?

MR. CRAWFORD: 2500, that's correct. We limited it to sixty-three years because, you know, how do you do a present value analysis on, you know, 480 some-odd years.

THE COURT: Well, I would also think as a matter of discount arithmetic you wouldn't want to.

MR. CRAWFORD: Right.

THE COURT: Because those damages from 2500 are going to have a very low present worth.

MR. CRAWFORD: Exactly. My point in saying that, Your Honor, is we don't know what the ultimate cleanup's going to be, but if we have a trial on this we're going to be able to show, we believe, with very, very clear specificity that it's going to be at least this much; probably a lot more but at least this much. To that extent it would not be speculative.

Briefly on the co-liable with the debtor. I'm going to confess, Your Honor, I don't understand their argument. This is a contract between NPC and Chemtura. NPC bills

Chemtura for its share of the cleanup and so far, well, Chemtura paid about twenty million dollars. Then they filed bankruptcy, they stopped paying.

I don't know how NPC could be liable for its debts or not its debts, its bills that it sends to Chemtura. And equally confusing to me is how NPC, who's not a party to the consent decree or the settlement agreement, is somehow liable to the federal government for this cleanup.

You know, Mr. Catalanello mentioned ACME as opposed to NPC. It's the same thing. Under Louisiana law, if you don't guarantee in writing the debt of another, there's no personal liability. The only way they could possibly pull NPC in through the back door is through an agency argument. The consent decree does mention the word agent. For the reasons that I set forth earlier, we believe there's been no showing of an agency relationship here at all, other than what would happen with every corporation in America. But for today, for summary judgment purposes, it would be a leap; I would submit respectfully, an impermissible leap to say that NPC, on summary judgment, is the agent for the shareholders, that a sufficient showing of control has been demonstrated such that NPC has now, somehow, become personally liable for this gargantuan undertaking to cleanup this petro processors site. There has been no showing of that whatsoever and that's the only way -- that's the only way you can tie NPC into the 502(e) argument as

far as I can tell.

And that's kind of why we talked about veil piercing, because they really want to disregard NPC where they can fit this claim comfortably under 502(e)(1). And Your Honor, I've read your decisions from Lyondell and from this case. I understand where you come down on that and that's fine. But you can't get there without making this extraordinary leap to find, as a matter of summary judgment, that NPC is the agent of these shareholders.

And of course -- and you get there and then you have that co-liability argument. As you well know, that's one of the three absolute requirements to file under 502(e). You have to be co-liable for the debt. I just don't see how NPC can be co-liable for its bills that it sends out to Chemtura. It makes absolutely no sense at all to me.

Briefly, Your Honor, on the proof of claim; I think you hit the nail on the head. You know, we represent NPC. We, meaning my law firm, me. Maybe we could have filed duplicative claims for these folks. We didn't. We filed this claim in the first instance for NPC. And, you know, we didn't want to get -- we didn't want to get tagged with an argument that nobody knew about these other parties or that somehow or another if you were to find at the end of the day that they are the parties with the claim, oh by the way it's too late to file a claim.

But frankly, our first position and primary position has always been that NPC is the party here and that was, at best, alternative pleading to avoid some gotcha litigation down the road.

In sum -- I do want to mention something about the work. Article 1 of -- with respect to the work. The way I read that and, you know, if there's a differing interpretation of that then it's not right for summary judgment either. The way I read that in the NPC contract, article 1, is the work that's referenced is, you know, the scope of the actual undertaking that's going to be done to clean this stuff up. That would be the same whether it was ACME or NPC. You still can't -- you still have that same separateness and you have to disregard NPC as an entity to get around that, and we don't believe there's any basis, in the law or fact, for you to do that, Your Honor.

And if you have any other questions, I'd be happy to answer them.

THE COURT: No. No, thank you. Mr. Catalanello, any reply?

MR. CATALANELLO: Brief, Your Honor.

THE COURT: All right. Limited, of course, to what Mr. Crawford raised.

MR. CATALANELLO: Understood.

THE COURT: Okay.

(Pause)

MR. CATALANELLO: Your Honor, let's start with the inability to pay. I heard the example that Mr. Crawford gave the Court about some brief, temporary reprieve, Your Honor. And I agree, that would be illogical, but that's not what happened here. It's been years since Chemtura has not paid this particular obligation under the contract.

And again, if you look at Exhibit 6 to my certification, NPC has acknowledged the failure or the inability to Chemtura to pay and is reallocating that orphan's share to the other defendants. That's what it's been doing. It's exactly what's in the record, a reallocation. It's not as if it happened for a week or two, it's been years. And again, NPC never came to this Court and sought any relief to have Chemtura somehow pay their obligation. It didn't do it. And now, of course, the contract's been rejected. It can't perform anymore.

THE COURT: Well, we agree that it's a pre-petition debt, right?

MR. CATALANELLO: That's correct, Your Honor.

THE COURT: Now, creditors trying to get paid on pre-petition debts before a plan has given them whatever they're entitled to under the plan. Unless they're critical vendors they've got a pretty tough row to hoe, don't they?

MR. CATALANELLO: Certainly, Your Honor.

THE COURT: I mean, I'm sure I wouldn't have held Mr. Crawford in contempt if he had tried but I would have thought he was the next coming of Tim Tebow.

MR. CATALANELLO: Well, that's a great analogy. But Your Honor, it's a little different here because --

THE COURT: He'd be relying a lot on faith, wouldn't he?

MR. CATALANELLO: He's doing a heck of a job with that, Your Honor.

But it's a little different here because it's in the papers. I mean, I'm looking at right now, for example, page 15 of the reply brief where NPC they admit that there's liability and that they have to borrow money. They say it right at paragraph 67 of page 15.

THE COURT: Wait. You're reading from where?

MR. CATALANELLO: Page 15 of the reply brief and I believe it's also in the affidavit. Can you just check the affidavit, the Dawson affidavit? I think it's the same thing. Paragraph 67, Your Honor.

MR. HEUER: It's their 7056 statement, Your Honor.

MR. CATALANELLO: Okay. It's in the brief and the statement.

THE COURT: Just -- I'm getting buried in my paper here, Mr. Catalanello.

MR. CATALANELLO: Okay. I apologize.

THE COURT: Just tell me what you want to tell me and I'm sure you're not going to be lying to me. And if Mr. Crawford thinks you quoted out of context, I'm sure he'll tell me.

MR. CATALANELLO: It's in the counter-statement filed. I apologize. In the counter-statement filed by NPC on page 15, paragraph 67 where NPC says, and I believe this is an admission of their own liability, that we have to borrow money to perform. They say, and I quote, "From the date of the bankruptcy filing, March 18th, 2009 until today, over 700,000 dollars has been advanced and/or invoiced." I don't know what that means. "Should these advances be discontinued for any reason, NPC would have no choice but to defer certain expenses and/or seek financing from another source, including its line of credit."

My point is two-fold, Your Honor. First, I think that shows that NPC is acknowledging they have their own liability. I mean, it's almost like a desperation that they need an ability to, sort of, pay the obligation, a way to pay the obligation. But equally important, there's been a reallocation for years and that's Exhibit 6 to my certification, the letter to the shareholders.

Your Honor, the second point I want to briefly touch on is the control mechanism. And Mr. Crawford got up here and said that essentially the argument I've made would, like, turn

upside down corporate America. I mean, I'm paraphrasing. But you know what, there's nothing -- there's nothing unique about these documents, that's the contention, but there's something very unique about the position I'm taking. Well, I disagree. There's nothing unique at all.

In this context this corporation, NPC, let's be honest with ourselves, it wasn't some entity out there that existed that we went and contracted with. We all created it. We created it and as the bylaws say, exclusively for this purpose, to clean up the waste. It's different, Your Honor. We created it for this purpose. And then we put all the bells and whistles in the corporate documents to make it clear it was going to be controlled by the shareholders.

Now I agree, there's nothing in this record that has anywhere in it Dow or Shell saying Dawson do this, Dawson do that. But we don't need that. That's not what Cajun says. It says you have to have the control. The control is here. You need four out of five members of the board to do anything, four out of five. The fifth is Dawson and he can't do anything by himself. The other four are the industry defendants and they have to be authorized to speak on behalf of the industry defendants.

THE COURT: Well more strictly speaking, Mr. Catalanello, the other four are designees of corporate defendants.

MR. CATALANELLO: Right. Right.

THE COURT: And what you're trying to win on summary judgment, because you've got a tougher task, you're not like Mr. Crawford who wants to live to fight another day, you -- if you want to win on that you have to say that the designees of the corporate defendants who were called directors and who at least arguably have the fiduciary duties of directors, are in many respects the same as the corporate defendants. Which may or may not be something you should win on as a matter of law.

MR. CATALANELLO: Your Honor, my colleague just pointed out to me the next provision of the bylaws that I was going to reference, which is -- it's article 5. And when it talks about the board it specifically says, Your Honor, article 5, page 3, that those board members have to be "authorized representatives of the stockholders". They are the stockholders, Your Honor. The stockholders are the defendants. It all leads back to the industry defendants. And that's not surprising given, again as I said, this wasn't ACME, a third party that they went out and found to perform the work. They created this entity, that's not disputed. Nowhere in Dawson's affidavit or anything in the briefs or any part of the record, I should say, from an evidentiary standpoint, disputes it. This was created exclusively for the benefit of these members to perform the work. It's built right into the bylaws.

And so I get it. I get that the argument could be

illogical in the context of a real third party that we were going out to hire, ACME. We're going to negotiate a contract with ACME to perform the work. It's different. We created ACME (sic), we don't dispute it. And I think that's a -- I think that's a very big difference but more importantly I think that's why there's no question of fact here, because it's undisputed how NPC came into existence and its purpose.

A couple of other quick points, Your Honor. The settlement agreement. I just want to correct, Mr. Crawford. He said that the only place it appeared is Exhibit A, and then he mentioned something like it didn't have the typical terms and conditions. Well, I beg to differ. I beg to differ because the contract, the first page, page 1, Your Honor, of the contract, says that "It shall be subject to the terms set out in that decree," the consent decree. More importantly, "As well as the agreement of settlement and compromise of disputed liability dated December 16th, 1983".

THE COURT: Where are you reading from Mr. Catalanello?

MR. CATALANELLO: Page 1 of the contract. Article 1 takes all of the terms of the settlement agreement, including the reallocation mechanisms and sticks it right in there, Your Honor.

THE COURT: Where on page 1?

MR. CATALANELLO: Page 1, it's the second paragraph

from the bottom beginning with "This work shall not be considered a construction undertaking". So I would argue, Your Honor, this document is very clear. Nothing ambiguous about it.

Did they enter into the contract severally? Yeah. We never dispute that. But it's sort of meaningless because they take the settlement agreement and stick it right in there, right on page 1. And then to make it even further clear, when it comes to how everyone was going to pay, they again remind people on Exhibit A, oh by the way, you've got to comply with the settlement agreement. So it's in two places, page 1, Exhibit A. I just wanted to make that point.

My final point, Your Honor, on co-liability. I don't think my argument is confusing. Is it a little complicated? Yeah, it's a little complicated but I don't think it's confusing. It's not confusing because again, here when you look at all the documents and I'm certainly not going to bore the Court with where we came from in terms of the evolution of this relationship, the consent decree, how it's binding on agents, representatives. It's very broad that language. How the consent decree contemplates designating an entity and then the settlement agreement, how it contemplated designating an entity.

When you put all of that together and then you top it, you top it with the contract language, the undertaking

language, very, very, very particular word, undertaking, to fulfill the requirements of the consent decree, it shall be subject to the terms set out in that decree. That's just not work. That's as if they were assuming that obligation. They could have used different language. They could have said, hey we're just going to perform work that you guys have to perform under the consent decree. That's not what it says. It's very clear, very powerful language but it's not surprising. It's not surprising because, again, the relationship between NPC and the industry defendants. The relationship gave birth to it, it created it. That's what they did.

I'm not attacking Mr. Dawson and keeping separate books and records, alter ego. I'm not going down there. I could have tried but of course that's factual and I don't know the facts as to whether or not they comingled assets. It doesn't matter. I'm not arguing that. What I'm arguing is there's co-liability.

First they acknowledge it, I believe, in their disputed -- in their statement, we just went over that. But more importantly, the contract it's as if they stepped in the shoes of the PRPs and they're going to fulfill that. And if they don't perform, somebody's going to come look for them. Somebody's going to come look for them. It's going to be the government. And if they don't perform, the industry defendants are all liable.

You get there two ways, Your Honor, two ways on co-liability. Is it different? Yeah. But does the law say it doesn't have to be the same? That's what it says, Wedtech, your Court's decision. It doesn't have to be the same theory. It doesn't have to be the same cause of action. There has to be co-liability on the debt of a third party. We think we have it, Your Honor. We believe we have it. We believe this record is clear we have it. And that's why we think summary judgment is appropriate, Your Honor.

I have no other remarks at this time, unless the Court has some questions.

THE COURT: All right. Thank you. Folks, here's what -- Mr. Crawford?

MR. CRAWFORD: Very briefly. Very briefly, Your Honor. This contract it does say that it's subject to the terms. The work, and I'm talking about the NPC contract, June 1984, article 1. The work is an undertaking to fill the requirements of the consent decree. We don't argue with that.

There's a difference between that work being subject to the terms of the settlement of disputed liability and somehow saying that this contract, the only one NPC is a party to, is NPC coming in and saying that they are personally liable for all the debts of this remediation. To make that stretch is, I would say, incredible. This language does not, in any way, say that NPC is bound. Yes, it's going to do the work.

Yes, it was created to do the work.

I thought it was somewhat interest Mr. Catalanello admitted something we've been saying from day one, he doesn't know the facts. Well, maybe that explains why there's only one affidavit.

THE COURT: I think in fairness to poor Mr. Catalanello that what he was saying that he wasn't aware of the facts on was vis-a-vis the piercing the corporate veil issue.

MR. CRAWFORD: Exactly. Exactly. But as we contend, in order to get to NPC, because there's nothing in here that saying their work is going to be subject to the consent decree or the settlement agreement, that goes so far as to say, under Louisiana law, and oh by the way NPC is personally guaranteeing the debts of Exxon, Shell and Dow. Why on earth would they do that? That makes no sense at all.

Under Louisiana law, and we didn't even brief this because it didn't really come up, but under Louisiana law you can't -- I mean, a guarantee of another's debt has to be express and in writing. And this, in no way, I believe under Louisiana law or any law for that matter, would somehow or another bind NPC to the obligations of these industry defendants that they owe to the government and other regulatory authorities that have oversight of this remediation.

So there is no -- there is nothing in this contract that would even hint at that. And so we don't believe there's

been anywhere near a sufficient showing of co-liability. Again, what we're talking about is NPC's bills to Chemtura. It's doing the work, there's no question about that, just like if it was ACME.

Now, I will agree with Mr. Catalanello that it's -- you know, we're not ACME. We haven't hidden from that. This company was created, it has shareholders, it has a board, it has a president and it operates as a separate entity and there's no challenge to that. Is it ACME? For purposes of today I would suggest that there's no distinction unless you disregard NPC as an entity altogether and there's not a showing here sufficient to do that, not even close.

And I will just point this out, there's, you know, the industry defendants certainly could have hired an ACME-type company, a for-profit company or could have made NPC for profit, I guess. I can only surmise that they didn't do that because they didn't want to be perceived as profiting off their own remediation cleanup. But there's nothing about that, whether they used ACME or NPC Services to perform their obligations that each owed to the government. There's nothing before you today that would prove or establish that NPC is co-liable for this debt or that there has been a sufficient showing of control that could warrant a finding that NPC is the mere agent of these shareholders. It's not there, Your Honor.

We would suggest that summary judgment be denied. We

believe there's been a sufficient showing that it could be granted to the extent that we ask for, that NPC be found to be the party-in-interest and that there be a trial on the extent of the damages suffered by NPC.

THE COURT: Well Mr. Crawford, on your last request Rule 56, as rewritten, makes it clear, rewritten a year or two ago, makes it clear that you can't issue summary judgment in the other direction without setting up that for a separate notice and hearing, if I recall correctly.

MR. CRAWFORD: Okay, Your Honor.

THE COURT: Having written a section of Collier on that subject.

MR. CRAWFORD: I will certainly defer to you on that Your Honor.

THE COURT: Okay.

MR. CRAWFORD: There has not been a sufficient showing that summary judgment should be granted in favor the reorganized debtors. We ask you to deny their motion and allow us to go forward with this.

THE COURT: Okay. Folks, here's what we're going to do. You're going to take a long lunch and I want you back at 2 o'clock. Do you have a plane that you need to catch, Mr. Crawford?

MR. CRAWFORD: I do, Your Honor. I'm glad you asked me that because I didn't want to -- my flight is at 4:20 from

LaGuardia. I have checked out of the hotel. My bag is back at the hotel, which is in mid-town.

THE COURT: Well, if you want to be back at 1:30 and -- to take the chance that I may keep you waiting a little, you're free to do that and maybe you guys can take an hour and a half lunch and it won't take you very long to eat lunch in this neighborhood, at the prices for which I want bankruptcy lawyers to be eating, at least. And if worse comes to worse, I guess Mr. Michael can hear the ruling.

MR. CRAWFORD: That's fair enough, Your Honor. Thank you.

THE COURT: Okay. All right. Then we're in recess until 1:30 with no guarantees.

MR. CATALANELLO: Your Honor, can we leave our stuff here?

THE COURT: Yes, as long as you understand I can't guarantee its security. You have permission to do it. Frankly, I don't think anybody's going to want to steal your copies of the briefs; I'll give them mine if they're that anxious. But that's what we're going to do.

MR. CRAWFORD: Yeah. I don't even want them.

THE COURT: Okay.

(Recess from 12:00 p.m. until 1:33 p.m.)

THE COURT: Have seats, please.

Ladies and gentleman, I'm denying the motion for

summary judgment and because I think that the issues aren't particularly close, ultimately, I'm going to give this decision orally and set forth the reasons for it relatively briefly.

In summary, I think there is an issue of fact as to whether or not the various PRPs made NPC their agent for satisfying their obligations under the consent decree and for securing recovery on their individual reimbursement rights by filing a proof of claim on their behalf in the bankruptcy court.

The principle issue is whether the PRPs exercised the requisite amount of control and I can't decide that in Chemtura's favor on a motion for summary judgment. And I think the agency issue is important because I'm not in a position to find that NPC, as contrasted to the individual PRPs, referred to in the agreement sometimes as the defendant companies and sometimes as the industry defendants and sometimes, perhaps, other things, who the government sued was liable or could be found to have the potential liability to governmental agencies, thereby satisfying the co-liability requirement under Section 502(e)(1).

Likewise, I think there is at most an issue of fact as to Chemtura's contention that NPC wasn't damaged by reason of the provisions in the consent decree and the settlement agreement providing for other PRPs to make good on another's obligations if one PRP became insolvent or otherwise had an

inability to pay.

In fact, it's only because the contractual wording is slightly ambiguous and failing to distinguish between temporary and permanent inabilities to pay that I couldn't grant summary judgment in the other direction on this particular issue.

I'll give Chemtura a chance to show, if it can, that the parties intended that a temporary inability to pay was intended to let an obligor off the hook permanently on its obligations to fund NPC.

The following are the bases for this decision rearranging the issues somewhat, to deal with them in a logical progression. Turning first to the co-liability of NPC on its own. I first have to reject the contention that NPC, as a principal, as contrasted to agent, satisfied the co-liability requirement under 502(e)(1). Of course it's true, as I held in my earlier decisions in Lyondell Chemical and in earlier proceedings in this case, see 436 B.R. 286, 442 B.R. 236 and 443 B.R. 601, that the co-liability requirement can be satisfied by means other than a court decree holding the parties seeking reimbursement to be liable.

For instance, the co-liability requirement can be satisfied by a statutory obligation imposed upon the claimant, see Lyondell 442 B.R. at 235 to 237. It also can be satisfied when a party satisfies its obligations by voluntary cleanup rather than by waiting for a government action. See one of the

Chemtura decisions I issued, 443 B.R. at 622.

But here there has to be some basis upon which the claimant would have the underlying liability, upon which co-liability has been based, see Wedtech where Judge Bushman held that "The co-liability requirement is to be interpreted to require a finding that the causes of action in the underlying lawsuit assert claims upon which, if proven, the debtor could be liable but for the automatic stay."

Putting it a different way, there is a wide array of different ways by which the debtor could be liable to a third party, such as the federal government or a state environmental agency, or the party seeking reimbursement could. Judge Bushman talked about one of those variants; the combinations can be mixed and matched in many different ways. But in each case each one of the two sides of the seesaw must have some, at least, arguable basis for liability to the federal government, to the state environmental agency, to the tort litigant as we had with Diacetyl or some similar party out there in the world trying to go after multiple entities. And there's no basis for finding the requisite liability on the NPC side of that seesaw when you look at it in those terms.

Here there has been no showing of any basis upon which NPC, which was not a PRP or a party to the consent decree, could ever be liable on the underlying obligation for which co-liability would have to be measured, which would be a liability

to the U.S. government, it's EPA, the State of Louisiana, its EPA or any other environmental regulatory agency that might have jurisdiction over the requisite cleanup.

Also, there's been no contention that the government here has put in a claim for it, these remedial costs itself, thereby subjecting Chemtura to a risk of redundant recoveries. See, again, one of the Chemtura decisions, 443 B.R. at 622 to 623. And in this respect this case contrasts dramatically with each of the other three decisions that I issued in this regard.

Turning now to agency. Notwithstanding everything I just said, it's true, of course, that each of the corporate defendants who were sued and became parties to the consent decree would satisfy the co-liability requirement. And I can't rule out the possibility, at least on a motion for summary judgment, that the PRPs who would satisfy the co-liability requirement designated NPC as their agent or instrumentality to act on their behalf.

Both sides agree on the importance of the Cajun Electric Power Cooperative case, 230 B.R. 683, which discussed the requirements for establishing an agency under Louisiana law. That decision held, among other things, that under Louisiana law an agent is one who acts for or in the place of another, with authority from the latter, that the parties seeking to rely upon an agency relationship has the burden of proving its existence and that control of the agent by the

principal is an essential element in an agency relationship. And that the essential test in determining whether the relation of principal and agent exists between persons bound by contractual relations is whether the principal has the power to control the agent and such control must extend to both the means and the details of the process by which the alleged agent is to accomplish its task. See 230 B.R. at 688 to 689.

Here there are issues of fact as to those matters. That's particularly so since the defendant companies designated members of the board. There's no evidence as to the extent to which members of the board were subject to directions by defendant companies and those directors, at least arguably, would have fiduciary duties to NPC that would impair their ability to act at the direction of whoever had nominated them and named them to the board.

On the other hand, there may have been informal understandings as to how NPC would perform its duties on behalf of the defendant companies. And the settlement agreement provides "The industry defendants shall jointly designate a representative or separate entity to implement the remedial action and carry out the additional maintenance and monitoring required by the consent decree". With, of course, the consent decree imposing obligations upon the industry defendants.

If NPC was that entity that, together with other extrinsic evidence, might support the existence of the required

agency. That issue could go either way but most obviously it's inappropriate for summary judgment and I can't decide it on summary judgment now.

Chemtura also argues for an agency finding, based on NPC's filing of a proof of claim on its own behalf but alternatively on behalf of the defendant companies. Given NPC's honest with respect to the matter and also because of the complexity of the issue and, frankly, because NPC was between a rock and a hard place, I'm not in a position to find a judicial estopple or otherwise bind NPC to an agency finding based solely on its having filed that proof of claim. Instead, I need, with the benefit of evidence, the issue that I addressed before, the extent to which NPC was used as an agent or instrumentality of the defendant companies and in connection with this proof of claim and otherwise, if it is so, whether it was used as a device to get around the rule under 502(e)(1), to which the defendant companies would so obviously be subject if they had filed proofs of claim on their own.

Turning next to the issue as to the extent, if any, to which NPC was damaged. Chemtura also contends that it's entitled to summary judgment on the premise that NPC has suffered no damages and would suffer no damages going forward based on language in the consent decree and the settlement agreement obligating the other defendant companies to step up to the plate to meet fellow defendant companies' shortfalls

under certain circumstances. That, Chemtura argues, would ensure that NPC would not be injured, by reason of Chemtura's failure to perform.

More specifically, the settlement agreement provides, on pages 4 and 5, "In the event of the insolvency, or other inability of any of the industry defendants to meet any obligations imposed under the consent decree, and such obligations are imposed on the remaining industry defendants or any of them pursuant to the consent decree, the remaining industry defendants agree to share such obligation by pro rating the unavailable percentage according to the above percentages". And of course I've truncated it. Similar language appears in the consent decree.

But I'm not in a position to rule that this establishes that NPC wasn't injured as a matter of law. The duty to make payments that's imposed on the other industry defendants in the language that I just quoted is conditional. It takes place under certain circumstances, based upon certain events. One such event is insolvency; the other is the inability of any of the industry defendants to pay. But here Chemtura isn't insolvent. Nor, with the benefit of hindsight, at least, can I find that it ever was. And turning to the second clause, Chemtura was only temporarily unable to pay. Now it can pay just fine.

There is a little bit of ambiguity in the language I

just quoted. Did the parties intend that even a temporary inability to meet obligations would get a party off the hook for all time? Or was the language that I just quoted intended to deal with the problem for only as long as it was in existence. Or was it intended to achieve some other purpose or to have other temporal limitations or significance?

I think I could divine the answer to that if no further parol evidence were submitted, just as I was asked to and did construe ambiguous language when both sides declined to give me parol evidence in a decision I issued in General Motors about a week and a half ago. But I'll give the parties the opportunity to give me any available parol evidence on this, to the extent that any is available. And in any event, I can't grant summary judgment to Chemtura at this time based on Chemtura's view of that language's meaning.

Under these circumstances and because of disclaimers made by Chemtura, I don't need to deal with the veil piercing contentions at this time.

NPC is to settle a plain vanilla order stating that for the reasons set forth by the Court on the record, summary judgment is denied.

The parties are to confer with each other to agree on a schedule for discovery and any other matters necessary to tee up the totality of the remaining issues for trial. And by that I mean both liability and damages. And at the risk of stating

the obvious, Chemtura is entitled to full discovery as to the bases for the claims of damages which, in part, may be subject to some debate.

Not by way of re-argument, are there any open issues?

(No response)

THE COURT: All right. Thank you folks. Have a good day. Have a good flight.

MR. CRAWFORD: Thank you, Your Honor.

MR. CATALANELLO: Thank you, Your Honor.

MR. CRAWFORD: For submitting the order --

THE COURT: Settling an order is a word of art in New York which means that you -- it's like a notice of lodging in California. You submit the order that you wanted me to consider by providing a copy to your opponent and if he -- or you can consult and -- it's without prejudice to the right to appeal. And he can say that order fairly reflects the ruling or it doesn't. If it doesn't, then he'll submit his own and I'll decide which I'm going to sign and the time to appeal will run from the time of the entry of the order.

MR. CRAWFORD: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 1:51 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Pnina Eilberg, certify that the foregoing transcript is a true and accurate record of the proceedings.

Pnina Eilberg

Digitally signed by Pnina Eilberg
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Date: December 14, 2011